87-129

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Rule 28.1 - Disclosure

Petitioner's Parent: Southern Pacific Transportation Company (in voting trust)

Affiliated Companies: Southern Pacific Company

Sante Fe Southern Pacific Corporation

QUESTION PRESENTED FOR REVIEW

The opinion of the District Court as affirmed by the Fifth Circuit Court of Appeals erred when it enforced an arbitrator's punitive damage award against Petitioner in violation of the Railway Labor Act, 45 U.S.C. Section 153 First (q), and in violation of labor law principles as set forth by this Court in *IBEW v. Foust*, 442 U.S. 42 (1979) and *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS DELIVERED BELOW

The United States District Court for the Eastern District of Texas, Tyler Division, delivered its opinion on December 17, 1985, granting the Brotherhood of Railway, Airline and Steamship Clerks (hereinafter "BRAC") summary judgment. That opinion enforced an arbitrator's award dated May 9, 1983, as supplemented by an interpretation dated September 6, 1983. Copies of the unreported order and arbitrator's award are attached to this Petition in the Appendix. The United States Court of Appeals for the Fifth Circuit affirmed the decision without opinion on June 4, 1987. A copy of the decision is also attached to this petition in the Appendix.

JURISDICTION

The judgment sought to be reviewed was entered on June 4, 1987. The United States Supreme Court is conferred jurisdiction in this matter pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

This Petition for Writ of Certiorari involves interpretation of 45 U.S.C. Section 153, First (q), which provides in pertinent part:

> If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. ... On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. ...

STATEMENT OF THE CASE

Petitioner, St. Louis Southwestern Railway Company (hereinafter "Railroad"), is a railroad engaged in the transportation of property in interstate commerce and is subject to the provisions of the Railway Labor Act, 45 U.S.C. Sections 151-163. The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated

labor association representing the craft or class of clerical, office, station, storehouse, telegraphic, and related employees on the Railroad. BRAC represents those employees with respect to rates of pay, rules, and working conditions pursuant to the Railway Labor Act.

There is a collective bargaining agreement extant between the Railroad and BRAC.

This dispute arose on February 15, 1975, when the Railroad began moving "bad order" wheels (wheels on railroad freight cars that need significant repair) from its spot repair track to the Wheel Shop (the location where major repairs are made) via Southwest Transportation Company. The spot repair track and the Wheel Shop are both physically located at the Railroad's Pine Bluff, Arkansas, facility. The employees who began moving the bad order wheels were not employees of the Railroad, nor were they represented by BRAC.

BRAC grieved through the process provided by the collective bargaining agreement with the Railroad the decision to transport wheels with persons other than BRAC-represented employees. The grievance was brought in the names of Charles Helloms as the claimant and his "successors" in his job. Section 3 First (i) of the Railway Labor Act, 45 U.S.C. Section 153 First (i), provides that any dispute between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning the rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such claims. This procedure was followed, and the claim was denied by the Railroad on the basis that the collective bargaining agreement with BRAC lacked a prohibition forbidding the Railroad from subcontracting the work to an outside contractor *and* that the claimant, Helloms, and his successors were not losing any money or work as a result of the measure taken.

BRAC, dissatisfied with the Railroad's answer to the grievance, referred the dispute to Public Law Board 1186 pursuant to Section 3 First (i) of the Railway Labor Act. Section 3 Second of the Railway Labor Act, 45 U.S.C. Section 153, Second, provides for a system of compulsory arbitration for the resolution of disputes between employees and carriers growing out of the interpretation and application of collective bargaining agreements. If a dispute remains unadjusted on the property, as in this case, either party may submit the controversy to the National Railroad Adjustment Board ("NRAB") for resolution, or the parties may create a Public Law Board or arbitration panel composed of three members to hear their dispute and render a decision. The powers of a Public Law Board are co-extensive with those of the NRAB, whose jurisdiction is limited by Section 3 First (i).

The decision of the neutral member and Chairman of Public Law Board 1186 issued in Award No. 316 in Case No. 905 on May 9, 1983. The Public Law Board ruled that the collective bargaining agreement had been violated by the Railroad in 1975. It ruled that BRAC, in its presentation to the Board, had failed to demonstrate what, if any, monetary damages Helloms or anyone else represented by BRAC had suffered.

The Public Law Board then granted punitive relief to BRAC's claimant and his successors against the Railroad.

> Nevertheless, we conclude a penalty is required ---therefore, Helloms, his successors shall be paid by SSW in addition to all other earnings, eight hours for five days each week commencing as of February 18, 1975, until such time as the parties stipulate in writing that SSW has purged itself of the violation of the collectively bargained agreement.

The Railroad's member of the Public Law Board filed a dissent to the Award. In the dissent to the award, the Railroad

pointed out the Public Law Board did not have the authority **or jurisdiction** to write a new rule. The dissent stated:

> If this award is permitted to stand, it would create by construction an agreement rule never contemplated nor negotiated by either party. Therefore, it is the Carrier's position that the neutral exceeded his jurisdiction in awarding punitive damages . . .

The Railroad, through the carrier member of the Board, sought from the neutral member an interpretation of the Award pursuant to paragraph 10 of the agreement that established the Board. The Railroad requested to know what provision of the collective bargaining agreement gave the neutral the authority to impose a punitive award. Citing no specific provision of the collective bargaining agreement, the neutral member's reply was merely that he "relied on the whole cloth of the collectively bargained agreement"; "the agreed upon interpretations thereof"; and "the longstanding past practice of the parties." The neutral member cited **one** previous award in support of these three explanations [Award 211 (Dugan) PBL 1186]. Award 211 of PLB 1186 entered on June 7, 1977, postdates the 1975 decision of the Railroad to subcontract the work in question by two years and four months.

While the parties were awaiting the neutral member of the Board's interpretation of the award, BRAC filed an action to enforce the Award in the Eastern District of Texas pursuant to the provisions of 45 U.S.C. Section 153, First (p). The Railroad cross-petitioned to set aside the punitive relief pursuant to 45 U.S.C. Section 153, First (q). The Railroad did not challenge the Board's decision that it had violated the collective bargaining agreement by subcontracting the work. Rather, the Railroad challenged the punitive relief granted as being outside the jurisdiction of the Board to grant such relief. Cross-Motions for Summary Judgment

were filed after the interpretation was received by the parties. The district court enforced the Public Law Board's Award in toto, including its punitive relief, finding that punitive relief was an available remedy under the Railway Labor Act even in the absence of contractual authority to grant it, relying primarily upon *Brotherhood of Railroad Trainmen v. Central Georgia Railway Company*, 415 F.2d 403 (5th Cir. 1969). The Railroad filed a Motion to Remand the matter to the Public Law Board after the district court determined to enforce the punitive relief. The Railroad's Motion was denied. The district court entered an Order on October 29, 1986, setting out the amounts of money to be paid to Helloms and his successors. Notice of Appeal was filed on November 20, 1986. Subsequently, on December 23, 1986, a final judgment was entered in the amount of $139,012.67 of which $135,232.00 are damages to be paid to Helloms and his successors and $3,780.67 of which is attorneys' fees granted to BRAC.

The Court of Appeals for the Fifth Circuit affirmed the decision of the district court without opinion on June 4, 1987.

ARGUMENT

There are two reasons why this Petition for Certiorari should be granted in the Railroad's opinion. First, the Fifth Circuit's opinion violates the Supreme Court's decision in *IBEW v. Foust*, 442. U.S. 42 (1979), insofar as that case holds that the Railway Labor Act is considered remedial in purpose and not punitive. The Fifth Circuit's opinion is also contrary to the reasoning behind *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940), holding that the National Labor Relations Board does not have the authority to impose punitive sanctions against parties before it. Second, the Fifth Circuit's opinion conflicts with an opinion of the Fourth Circuit concerning an arbritrator's authority under the Railway Labor Act to grant pure penalty pay without contractual authority to do so. The Fourth Circuit decided in *Norfolk and Western Railway Company v. BRAC*, 657 F.2d 596 (4th Cir. 1981), that an arbitrator does not have the authority under the Railway

Labor Act to grant punitive damages to one party or the other absent express contractual authority to do so when those damages amount to "pure" penalty pay, i.e., there being no showing of compensatory loss, the arbitrator just simply imposes a monetary fine.

It is the Railroad's position that a public law board acts outside of its authority and, consequently, its jurisdiction, when it fashions a remedy that is purely punitive, absent express contractual authority. The contract violation in this case involved an assignment of work by the Railroad to the wrong people. This violated the "scope" rule of the contract. In the arbitration, the Union failed to show any compensatory damage to any of its members. In other words, the Union totally failed to demonstrate that because of the breach of the contract there was any monetary loss to anyone.

This Court in *Union Pacific Railroad Company v. Sheehan*, 439 U.S. 89 (1978) re-emphasized that the 1966 amendments to the Railway Labor Act mean what they say. The findings and order of a Board are conclusive and may be set aside only for failure of the Board to comply with the requirements of the Railway Labor Act, failure of the board to conform or confine itself to matters within the scope of its jurisdiction, or fraud or corruption on the part of a member of the Board. It is also conceded by the Railroad that many circuit courts have ruled that the scope of review of an award by a National Railroad Adjustment Board or a Public Law Board is extremely narrow. *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970). However, when an award does not draw its essence from the collective bargaining agreement extant between the parties, it is without foundation in reason or fact. *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960) and *Brotherhood of Railway Trainmen v. Central Georgia Railway Company*, 415 F.2d 403 (5th Cir. 1969).

It has been held that any award that exceeds the monetary loss suffered is punitive. If a contract only contemplates compensatory awards, an award that is punitive does not draw its essence from the collective bargaining agreement. *Foley Company v. Electrical Workers Local 639*, 122 LRRM 2471 (9th Cir. 1986). A Public Law Board award of purely punitive damages is outside of that board's jurisdiction when there is no support in either the express provisions of the agreement or the controlling precedents. *Norfolk and Western Railway Company v. BRAC*, 657 F.2d 596 (4th Cir. 1981).

An arbitrator is not to dispense his own brand of industrial justice. *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960). Awards of punitive damages do not comport with the purposes of the Railway Labor Act or with national labor policy. *IBEW v. Foust*, 442. U.S. 42 (1979). In *Foust*, the Supreme Court reviewed previous Railway Labor Act and National Labor Relations Act cases and discerned a compensation principle in those cases dictating that a damage award make an employee whole and nothing more.

> Acknowledging the essentially remedial objectives of the National Labor Relations Act, this Court has refused to permit punitive sanctions in certain unfair labor practice cases, (citations omitted). Like the National Labor Relations Act, the Railway Labor Act is essentially remedial in purpose. . . . Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance.
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> *Id.*, at 52.

The Court's decisions in *Foust* and *Republic Steel Corporation v. NLRB* make it clear that it is the policy under both the Railway Labor Act and the National Labor Relations Act that an injured employee is entitled to be made whole but not to extract punitive damages from the other party to a controversy. See *Brotherhood of Railway Carmen v. Delpro Company*, 579 F.Supp. 1332 (D.Del. 1984).

There seems to be no reason why there should be a distinction under the Railway Labor Act treating it differently concerning punitive damages than decisions made pursuant to the National Labor Relations Act or Section 301 of the Taft-Hartley Act. A number of courts have acknowledged that punitive awards under Section 301 should not be enforced absent a contractual provision authorizing punitive damages. *International Association of Heat and Frost Insulators v. General Pipe Covering, Inc.*, 613 F.Supp. 850 (D. Minn. 1985); *Safeway Stores, Inc. v. IAM*, 534 F.Supp. 638 (D. Md. 1982) and *International Union of Operating Engineers v. Mid-Valley, Inc.*, 347 F. Supp. 1104 (S.D. Tex. 1972).

Consequently, the Court should grant this Petition for Writ of Certiorari on the basis that the Fifth Circuit's affirmance of the district court's opinion is contrary to the rationale of this Court's opinions under both the Railway Labor Act and the National Labor Relations Act. The opinion is also contrary to the Fourth Circuit's opinion in *Norfolk and Western Railway Company v. BRAC*, 657 F.2d 596 (4th Cir. 1981). The opinion also violates *Enterprise Wheel's* edict that an arbitrator is not to dispense his own brand of industrial justice.

CONCLUSION

Petitioner respectfully urges this Court to grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BROTHERHOOD OF RAILWAY, AIRLINE, STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Petitioners,

v. CIVIL ACTION NO. TY-83-232-CA

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

ORDER

Before the court for resolution are cross motions for summary judgment under Rule 56, F.R. Civ.P., filed by petitioners, Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), and respondent, St. Louis Southwestern Railway Company (SSW), respectively. For the reasons that follow, it is held that there is no genuine issue as to any material fact, and that, as a matter of law, summary judgment on behalf of petitioners BRAC and against SSW is proper. In addition, BRAC is awarded attorney's fees and costs.

This civil action was instituted by petitioner BRAC for enforcement of Award No. 316 of Public Law Board 1186.[1]

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[1]The use of Public Law Boards, as an alternative to the National Railroad Adjustment Board, is authorized by 45 U.S.C. 153 Second. Consequently, Public Law Boards "must conform to the same prodecural restraints imposed on the Adjustment Board . . .[and] any decisions or statutes delineating the powesr and responsibilities of the National Adjustment Boards are applicable [to them]." *Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees v. St. Louis Southwestern Railway Company*, 676 F.2d 132, 135 n. 2 (5th Cir. 1982).

Jursidiction is predicated on 45 U.S.C. §153, First (p),[2] which permits a party to seek enforcement of an Adjustment Board award in federal district court. The material allegations are not in dispute.

The underlying controversy began, in early 1975, when SSW began using an outside contractor to transport bad order wheels. BRAC, alleging that the use of an independent contractor was violative of its collective bargaining agreement, sought to resolve the matter through grievance. After failing to settle their differences, , BRAC and SSW sought arbitration of the claim before Public Law Board 1186. On May 9, 1983, the Board rendered its decision in Award No. 316. In its decision, the Board found that it had jurisdiction over the dispute, and that the terms of the collective bargaining agreement had been violated.

Consequently, the Board sustained BRAC's claim. For relief, the Board ordered SSW to pay Charles Helloms, Jr., a BRAC member, "in addition to all other earnings, eight (8) hours for five (5) days each work week commencing as of February 18, 1975, until such a time as the parties stipulate, in writing, that *SSW* has purged itself of the violation." Resp. ex. A, p. 15. The award is undiminished by any amount which Helloms earned during the period in question. Thus, the Board penalized SSW for the violation.

Dissatisfied with the penalty pay aspect of the award, the carrier member of the Board, R. L. Camp, requested an interpretation of the award from the neutral member of the Board, John J. Gaherin. Specifically, Camp asked Gaherin "to state the express rule or provision of the [BRAC-SSW] collective bargaining agreement that the neutral relied on when concluding a penalty was required." Resp. Br. p. 2-3. Prior to receiving the neutral's

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[2]**See**, note 3, *infra.*

interpretation, an SSW representative informed BRAC that SSW would not "comply with the Award until the matter had been adjudicated." *Id* at 3. Consequently, BRAC instituted this action, and SSW cross-petitioned to set aside the award.

Thereafter, the neutral board member, Gaherin, answered respondent's request for an interpretation. In a memorandum dated September 6, 1983, he explained that, in determining the appropriateness of the penalty, he "relied on the whole cloth of the collectively bargained agreement . . . the agreed upon interpretations thereof . . . the long standing practice of the parties." Respondent's ex. G,p.4. In support of this rationale, the neutral member cited Award 211 of Public Law Board 1186.

Award 211 was rendered in a case involving petitioner BRAC and respondent SSW. In that case, dated June 7, 1977, penalty pay was awarded for a contract violation at the rate of time and one-half. The award specified that the pay was "to be in addition to any and all compensation" the remunerated employee may have already received. Resp. ex. H.

DISCUSSION

It is beyond dispute that "[j]udicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption, 45 U.S.C. §153 First (q)." *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 93 (1978). Unless respondent's objections to an Adjustment board decision fall within one of these three categories, the Board's "findings and order . . .shall be conclusive on the parties," 45 U.S.C. 153 First (q), and may not be set aside by a federal district court. *Sheehan,* 439 U.S. at 93. In resisting the award, respondents assert only the second ground, claiming that the Board has failed to "confine [] itself to matters within the scope of its jurisdiction." *Id.* Thus, the law applicable to review of jurisdiction of a Public Law Board will be considered.

JURISDICTION TO AWARD PENALTY

Under the Railway Labor Act, "disputes between an employee ... and a carrier ... growing out of grievances or [illegible] of the interpretation or application of agreements" 45 U.S.C. §153, First (i), are to be resolved by Public Law Boards. Further, §153, First (m) provides that Public Law Board "awards shall be final and binding upon both parties to the dispute." Similarly, §153, First (p) provides that "the findings and order" of the Board "shall be conclusive on the parties."[3] This broad grant of jurisdictioin to the Public Law Board, and the finality of its orders, was recognized by the parties to this suit. Section 9 of the Memorandum of Agreement between SSW and BRAC provides that "awards of the board shall be final and binding on the parties"; Resp.ex.B. Finally, §1 of the memorandum recognizes the right of the parties to limit jurisdiction of the Board, a right not exercised in this case. *Id.*

The wide jurisdictional ambit given to Public Law Boards reflects the fundamental precept that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to

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[3]45 U.S.C. §143 First (p) pertinently provides: If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file ... a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties ... If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ or mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

arbitration under collective bargaining agreements." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Reliance on the arbitrator's "informed judgment" is particularly appropriate "when it comes to formulating remedies." *Id.* at 597. And though it is true that an arbitrator "does not sit to dispense his own brand of industrial justice", *id.*, nevertheless, "[i]t is the arbitrator's construction [of the collective bargaining agreement] which was bargained for." *Id.* Thus, it is well recognized that "judicial review in enforcement cases is among the narrowest known to the law." *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

The limited function of this court, then, is to determine whether the arbitration decision "draws its essence from the collective bargaining agreement." *Enterprise Wheel* at 597. The basis for this determination may be either the express terms of the contract or the custom and practice of the industry. *Brotherhood of Railway Trainmen v. Central of Georgia Railway*, 415 F.2d 403, 416 (5th Cir. 1969). If the arbitrator's award takes as its source either the provisions of the contract or the industry practice, then judicial review is foreclosed. *Id.*

In making this determination, the scope of a district court's "review is much narrower than the substantial evidence test." *Id.* at 411. Enforcement is appropriate when the award has "a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement." *Id.* at 412. Thus, if there is some evidence to indicate that the award has a "foundation in reason or in fact," *id.* at 410 (citations omitted), then enforcement is mandated.

Petitioner now seeks enforcement of an Arbitration Board award instructing that Helloms, or "his successor[s] shall be paid by *SSW* in addition to all other earnings, eight (8) hours for five (5) days each work week commencing as of February 18, 1975, until

such time as the parties stipulate, in writing, that *SSW* has purged itself of the violation of the collectively bargained agreement." Resp. ex., A, p. 15. Petitioner maintains that this award is rationally inferable from the BRAC-SSW agreement, and furthers its goals. In support of its cause petitioner relies on *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company*, 415 F.2d 403 (5th Cir. 1969. In *Georgia Railway*, the union challenged the change of a home terminal without prior negotiation with the locals. The change of terminals resulted in the reassignment of three trainmen. The Adjustment Board upheld the union's challenge, and awarded the three employees "a full day's pay . . . for every day that the change in home terminals remained in effect." *Id.* at 406. The award was undiminished by pay earned by the trainmen during the period of the violation. The railroad challenged the monetary award, claiming that penalty pay was not authorizied by the collective bargaining agreement and thus beyond the jurisdiction of the Board.

The Fifth Circuit disagreed, noting that an express contractual provision was not necessary to sustain a penalty pay award under the Railway Labor Act. Rather, "all an award of the Board requires to put it beyond the reach of the court" is a "foundation in fact and in law." *Id.* at 415. In finding this requirement satisfied, the court relied on several factors.

First, prior Fifth Circuit cases had established the principle that violations of collective bargaining agreements could be remedied by awarding "double pay."[4] Second, thousands of Board awards "recognize[d] the principle of penalty pay." *Id.* at 415, n. 22. Third, industry custom and practice were found "valid bases for fashioning remedies where the contract does not explicitly exclude them." *Id.* at 416.

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[4]In *Hodges v. Atlantic Coastline Railroad Co.*, 363 F.2d 534 (5th Cir. 1966) and *Sweeney v. Florida East Coast Railway Co.*, 389 F.2d 113 (5th Cir. 1968), the court had upheld a "double pay" award. *Georgia Railway*, 415 F.2d 415.

Finally, the *Georgia Railway* court rejected the carrier's claim that the award unreasonably penalized it for "seeking to enforce [its] legal rights" by making a business decision to change terminals. The court reasoned that instead of awaiting the outcome of the grievance process, the railroad could have returned to its prior practices and precluded the penalty award altogether. Thus, under *Georgia Railway*, a party is encouraged to resolve contract disputes through grievance and arbitration, not through unilateral actions.

Respondent relies on two cases to resist the award. First, SSW asserts that under *Refinery Employees Union v. Continental Oil Company*, 268 F.2d 447 (5th Cir. 1959), "penalty pay is only appropriate when an arbitrator is given that power by express language in the contract." Resp. Br. p. 9. Second, respondent asks the court to follow a Fourth Circuit case, *Norfolk and Western Railway Company v. BRAC*, 657 F.2d 596 (4th Cir. 1981). There, the court upheld a lower court ruling which set aside a penalty awarded in the absence of express language in the collective bargaining agreement to sustain the award.

The present case comes within holding of *Georgia Railway, supra.* On the facts submitted, it is apparent that Gaherin's award was inferable from the contract and furthers its purpose. As in *Georgia Railway*, there was evidence on the record to demonstrate that monetary awards in excess of actual earnings was part of the practice of these parties. Award 211, Resp, ex. H, clearly demonstrates that fact. Respondents' allegations to the contrary are unsupported by documentary proof. Thus, the court is inexorably drawn to the conclusion that Gaherin's award was within the jurisdiction of the Board, and a summary judgment for petitioner is required.

Respondent contends that Award 211 does not support Gaherin's decision in this case. SSW bases this contention on the following argument: The underlying dispute in Award 211 involved non-union workers doing work previously assigned to

union members as overtime. In this case, however, "BRAC did not take the position that the work being performed . . . was done on an overtime basis." Resp. Br. p. 8. Respondent reasons that the distinction between overtime in Award 211, and regular work hours in this case, precludes a penalty pay award. This argument is found unconvincing for two reasons.

First "[d]istinctions of this sort are simply too nice for the statutory standard of review." *Georgia Railway*, at 415. The issue in this case is not whether a violation of the collective bargaining agreement occurred. Respondent does not challenge the arbitrator's decision on that score. What is at issue is whether industry practice supports an award of penalty pay for a contract violation. Award 211 sufficiently establishes that fact to satisfy the standard of review in enforcement cases. Since it has been shown that penalty pay is part of industry practice, the arbitrator's "informed judgment" "when it comes to formulating remedies" must be respected by the court. *Enterprise Wheel, supra* at 597.

Second, even if respondent's factual distinction were cognizable, the conclusion of the court would not change. The harm to the union in Award 211 was loss of overtime work. The harm to the union here was loss of regular work. If penalty pay were appropriate in only one case, it would be this one, since the loss of regular work constitutes a greater erosion to BRAC's interests. To state the obvious, if a penalty is inferable from a contract violation for loss of overtime, a stronger inference is available when loss of regular work is involved.

Respondent's reliance on *Refinery Employees, supra*, is misplaced. There, the court barred a penalty award in an oil industry dispute in the absence of "express language in the contract." However, it is self-evident that oil industry practices have but little application in a railroad-labor dispute. Second, the 1966 amendments to the Railway Labor Act, which limited federal court review of arbitration awards in railroad-labor cases, must be acknowledged.[5] Those amendments **post**-dated *Refinery Employees*, lessening its impact. Finally, whatever vitality *Refinery Employees* may have had in this case was obviated by *Georgia Railway*, where the court held that no express contractual provision is needed to sustain a penalty. *Georgia Railway*, 415 F.2d at 412-16.

Nor has it been convincingly shown that the Fourth Circuit's decision in *Norfolk & Western Railway Company v. BRAC*, 657 F.2d 596 (4th Cir. 1981), precludes enforcement of a penalty in this case. While it is true that the *Norfolk and Western* court denied enforcement of an arbitrator's assessment of penalty pay, in the absence of an express contractual provision,[6] that is not the law of this circuit.

It is axiomatic that this court is constrained to follow the prevailing Fifth Circuit decision announced in *Georgia Railway, supra.* In this regard, it must be noted that the *Georgia Railway* case had been decided prior to the 1971 collective bargaining agreement between SSW and BRAC. As a result of that case, SSW was on notice that the absence of contractual language barring penalty pay could result in such an award. SSW had the opportunity to

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[5]**See** *Georgia Railway*, 415 F.2d at 409-11

[6]The *Norfolk and Western* decision, 657 F2d 596, rested on the faulty assumption that the *Georgia Railway* court "[d]id not go so far as to support the award of purely penalty pay." *Id.* at 602. The *Norfolk and Western* court concluded that *Georgia Railway* "merely upheld the award of compensatory damages in the form of wages an employee would have earned had he been appointed to a position to which he was entitled under a collective bargaining agreement unmitigated by the earnings he made in the lower paying position that he continued to retain during the period of violation." *Id.*

It is apparent that the quoted language, the holding of *Georgia Railway*, represents authorization of a penalty award under the Railway Labor Act. Any doubt as to that conclusion is resolved by reference to the Georgia Railway decision itself. ". . . the Board surely did not . . . exceed its jurisdiction in awarding penalty pay." 657 F.2d at 603.

negotiate for such a provision, and failed to do so. For their part, BRAC had a reasonable expectation that a contract violation would be remedied by a penalty under *Georgia Railway*. To follow *Norfolk and Western* in this case would compromise the original negotiating posture of SSW and BRAC, an unwarranted intrusion into the affairs of two freely contracting parties.

Finally, BRAC is granted attorney's fees and costs under 45 U.S.C. §153, First (p.) **See**,*Norfolk and Western, supra*, at 603. Accordingly it is

ORDERED that Award No. 316 of Public Law Board 1186 shall be, and it is hereby, ENFORCED against respondent SSW; and it is further

ORDERED that the parties shall agree upon or submit affidavits and other evidence of the sums due to the claimant upon whose behalf petitioner BRAC brought this action, by January 15, 1986; and it is further

ORDERED that petitioner BRAC submit affidavits and other evidence of the attorney's fees claimed to be taxed as part of the costs of the case pursuant to 45 U.S.C. §153, First (p) by January 15, 1986, and that respondent file any response to them by January 31, 1986.

SIGNED AND ENTERED this 17th day of December, 1985.

Wm. Wayne Justice
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Plaintiffs,

v. CIVIL ACTION NO. TY-83-232-CA

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Defendant.

ORDER

On February 17, 1975, respondent St. Louis Southwestern Railway Company (SSW) began using a non-union contractor to haul "bad order wheels" from its Pine Bluff, Arkansas yard. This work was covered by a collective bargaining agreement between SSW and the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). In Award No. 316, dated May 9, 1983, Public Law Board 1196 ordered SSW to pay Charles Helloms, Jr., the last BRAC member to haul bad order wheels before SSW contracted out the work, and "his successor(s)"

> . . . in addition to all other earnings[,] eight (8) hours for five (5) days each work week commencing as of February 18, 1975, until such time as the parties stipulate, in writing, that SSW has purged itself of the violation of the collectively bargained agreement —**i.e.**, using persons not covered by the [agreement] to perform the work . . ."

The union petitioned this court to enforce the award, and an order was entered December 17, 1985, granting summary judgment and awarding attorney's fees and costs to BRAC. Further

proceedings were stayed on April 3, 1986, pending conclusion of SSW's appeal from the summary judgment. By an order entered June 2, 1986, the Court of Appeals for the Fifth Circuit dismissed the appeal as premature, because the amount of damages due the claimant had not been specified. On June 11, 1986, this court ordered both parties to either agree on the amount due or to submit evidence establishing a figure.

Respondent now moves that Award No. 316 be remanded to the public law board for clarification. The award is unenforceably amgibuous, insists SSW, for three reasons: a post-award clarification by the board's neutral member suggests that enforcement of the award is contingent on agreement between SSW and BRAC on a "reasonable" damage figure; the board probably did not intend damages to accrue past July 31, 1980, the date when — according to SSW — Helloms's job was abolished and the chain of his identifiable successors was broken; and, finally, if damages accrued past 1980 there exist no successors to whom that portion of the award could be paid.

Under Award No. 316, SSW's liability accrues until BRAC members resume hauling bad order wheels at Pine Bluff. The railway has not disputed BRAC's claim — documented by a letter from SSW's labor relations manager to another railway official —that the work as returned on September 6, 1983. **See** Pet. Exh. B. to Decl. of R. R. Pinckard. In the clarification cited by SSW, the board's neutral member expressed his hope that BRAC and SSW would, as the award directed, bring their dispute to an end by jointly specifying the day on which SSW's violation (and thus is accrual of liability) ends. **See** Respondent's Affidavit of R. L. Camp at 2. Without identifying that date, he stressed that the parties were best situated to ascertain it, and urged them, essentially, to forego continued squabbling. Respondent's ironic assertion that this plea for finality and cooperation reveals fatal ambiguities in the award lacks any apparent basis in fact.

Respondent's remaining arguments for remand — that the award fails to specify duration of liability, or identity of recipients — assume that the court lacks authority to interpret and apply its remedial language. The Court of Appeals for the Fifth Circuit has stated that

> where [a Railway Labor Act] award is ambiguous, but can be resolved by reference to extrinsic evidence not involving the special expertise of the [public law] board, ... the district court may proceed to resolve the conflict in an enforcement [proceeding]. However, where ... the award is too indefinite to be enforced, and cannot be made definite by considering nonspecialized extrinsic evidence, then the court should remand to the board for clarification of the award. **See** *Hanson v. Chesapeake and Ohio Railway Co., 412 F2d 631 (4th Cir. 1969).*

United Transportation Union v. Southern Pacific Transportation Co., 529 F.2d 691, 693 (5th Cir. 1976). Award No. 316 provides a two-part remedial formula: that SSW pay straight time to Helloms and successors, in addition to other earnings, and that SSW's financial liability accrue until return of the work to employees covered by the collective bargaining agreement. "Nonspecialized extrinsic evidence" in the form of SSW's 1983 letter gives the date SSW returned the work to BRAC members, and the court accordingly finds that damages accrued from February 18, 1975, to September 5, 1983. Therefore, respondent's total liability to Helloms and successors equals the full-time wages payable to a Pine Bluff truck operator over that period of time, with no set-off for actual earnings.

It remains to specify individual recipients and dollar amounts of the award, an activity — expressly approven in *Hanson*[1] — requiring additional information from SSW and BRAC. In response to the court's June 11, 1986 order, BRAC aggregated damages through September 6, 1983, while SSW listed employees sums due them through July 31, 1980. If successors held Helloms's

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[1] "[I]t was not beyond the competency of the district court to enforce the award by ascertaining the names of the employees and translating the board's measure of damages into dollars and cents." 412 F.2d at 634 (footnote omitted).

job after July 31, 1980, each should receive a share of the award; if, on the other hand, that date marks the chain's end, award money deriving from the period between the last successor's separation from employment and September 6, 1983, should be allocated to Helloms and those who followed him, proportionate to the length of time each held the job covered by the award. (For example, a worker who held Helloms's job for one-tenth of the total period between Helloms's accession to the post and its abolition would receive, as his share of the award, straight time for the period during which he worked, plus one-tenth of the cumulative salary that a Pine Bluff truck operator would have earned working a forty-hour week from the time Helloms's last successor left the job to the date the violation ended.) Such an allocation, if it proves necessary, would effect Award No. 316's remedial formula; under these same circumstances, remand is unnecessary and inappropriate. **See** *Sweeney v. Florida East Coast Railway Co.*, 389 F.2d 113 (5th Cir. 1968), and *Diamond v. Terminal Railway*, 421 F.2d 228 (5th Cir. 1970). Therefore, it is

ORDERED that defendant's motion to remand shall be, and it is hereby, DENIED. It is further

ORDERED that the parties submit proposed orders by October 29, 1986, specifying (a) the total amount of money a truck operator in Helloms's position earned (or would have earned), working a forty-hour week from February 18, 1975 through September 6, 1983; (b) the chain of Helloms and successors, together with the sum of money each earned (or would have earned), working a forty-hour week during his or her time of employment; (c) if a chain of succession cannot be established through September 6, 1983, the portion of the award that accrued from the last successor's separation from employment through Setpember 6, 1983, those damages to be allocated to Helloms and successors, in proportion to the amount of time each spent in the job relative to others in the chain; and (d) the total dollar amount to be paid by SSW to each worker, together with affidavits or other evidence substantiating dollar amounts and allocations contained in the proposed orders. It is further

ORDERED that BRAC submit any supplemental attorneys' fees claims by October 29, 1986, and that SSW file any response to BRAC's original or supplemental attorneys' fees claims by November 12, 1986.

SIGNED AND ENTERED this 7th day of October, 1986.

Wm. Wayne Justice
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

PLAINTIFFS,

v. Civil Action No. TY-83-232-CA

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

DEFENDANT.

ORDER

Pursuant to the Court's Order entered on October 7, 1986, counsel for the plaintiff has conferred with undersigned counsel for the defendant and have agreed to submit a joint proposed order.

The total amount of money a truck operator in Hellom's position would have earned, working a 40 hour week from February 18, 1975, through September 6, 1983, is $135,232.00. The chain of Helloms and his successors, together with the sum of money that each would have earned as a truck driver working a 40 hour week, is as follows:

	Worked		
Name	**From**	**To**	**Amount**
C. Helloms	02-18-75	06-02-75	$ 2,945.94
W. W. Johnson	06-03-75	07-31-75	1,711.83
S. F. Work	08-01-75	11-30-76	15,012.41
E.C. Raines	12-01-76	04-18-77	4,531.07
R. D. Varnell	04-19-77	08-01-77	3,571.29
L. D. Reynolds	08-02-77	07-31-80	43,660.82
		Total	$ $71,433.35

No chain of succession can be established from July 31, 1980, through September 6, 1983, and, therefore, the additional amount of $63,798.65, which represents the gross amount that would have been paid to a truck operator working a 40 hour week between the dates of August 1, 1980, throught September 6, 1983, inclusive, shall be allocated pursuant to the October 7, 1986, Order entered by this Court to Helloms and his successors in proportionate amount of time spent in the job that Helloms held relative to the other individuals in the chain. Those figures are as follows:

Percentage of days worked in proportion to total number of days from February 18, 1975, through July 31, 1980:

C. Helloms	74 ÷ 1423 = 5.20%
W. W. Johnson	43 ÷ 1423 = 3.02%
S. F. Work	348 ÷ 1423 = 24.46%
E. C. Raines	99 ÷ 1423 = 6.96%
R. C. Varnell	76 ÷ 1423 = 5.34%
L.D. Reynolds	783 ÷ 1423 = 55.02%

Estimated potential earnings of claimant and successors from August 1, 1980, through September 6, 1983, based on percentage of time worked from February 18, 1975 to July 31, 1980, by claimant and successors to position 022:

Claimant and Successors	**Projected Earnings**		**% of Total Time Worked**		**Projected Earnings Based on % Worked**
C. Helloms	$63,798.65	X	5.20%	=	$ 3,317.53
W. W. Johnson	63,798.65	X	3.02%	=	1,926.71
S. F. Work	63,798.65	X	24.46%	=	15,605.15
E. C. Raines	63,798.65	X	6.96%	=	4,440.39
R. D. Varnell	63,798.65	X	5.34%	=	3,406.85
L. D. Reynolds	63,798.65	X	55.02%	=	35,102.02
					$ 63,798.65

The total dollar amount to be paid by the defendant to each worker is as follows: C. Helloms, $6,263.47; W. W. Johnson $3,638.54; S. F. Work, $30,617.56; E. C. Raines, $8,971.46; R. D. Varnell, $6,978.13; and L. D. Reynolds, $78,762.84.

Signed and entered this 29th day of October, 1986.

Wm. Wayne Justice
CHIEF JUDGE

IN THE UNITED STATES SUPREME COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2971

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES,

Plaintiffs-Appellees,

versus

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(TY-83-232-CA)

(June 4, 1987)

Before WISDOM, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 47.6

Before PLB 1186 — SSW - BRAC

R. L. Camp
SSW Member

Charles S. Coleman
BRAC Member

John J. Gaherin
Neutral Appointed
by *NMB*

Case No. 905 Award 316

Statement of BRAC's Claim:

"1. Carrier violated, and continues to violate, the Clerks' Agreement in using persons not covered by the Agreement to perform work encompassed in the Agreement, formerly performed by employees within and under the Agreement.

2. That Charles Helloms, Jr., his successor or successors, be compensated for eight (8) hours each day, 5 days per week (Monday through Friday) at the time and one-half rate of Shop Delivery-Truck Operator effective February 18, 1975 and continuing likewise until the work complained of is returned to Employees holding rights thereto and the violation is discontinued."

Background

These occurrences happened more than eight (8) years ago; thus, all references to factual situations are written in the past tense commencing with the Pine Bluff — Material Manager's instruction of February 15, 1975.

The basic facts are not in dispute — *SSW's* Engine and Car repair facilities — where all car and locomotive repair work is performed — as well as *SSW's* "Store Room" Department was situated at Pine Bluff, Arkansas.

We are concerned with "Store Area No. 3" — where all major car repair work was performed and where the "Wheel Yard" was located.

The Pine Bluff Store Department is the only facility of this type on the *SSW* property.

The parties agree:

1. *BRAC's* claim was the result of instructions issued February 15, 1975, by a Material Manager — i.e.,

"W.R.H.

Effective Tuesday 18th SWT* will move all wheel trailers for us, AE $10.00 per move.

Please call Max Thompson at Spot Rip and tell him to call SWT dispatcher when a load of bad-order wheels is ready to come to wheel shop.

I have instructed Hall to call when we have a load ready at wheel shop."

2. Prior to February 18, 1975 at Pine Bluff, the wheels were transported between the locations mentioned in the above-quoted instructions by incumbent of position titled "Shop Delivery-Truck Operator", a position covered by the *BRAC* Agreement. The general description of the duties of that position were listed as follows:

"DUTIES: Delivering material from various points of storage to shops. Transporting material between stores and between shops and stores, including mounted wheel assemblies and such forklift work as necessary."

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*SWT (Southwestern Transportation Company) an SSW subsidiary.

At the hearing, Tuesday, April 19, 1983, the parties also agreed that the issue to be decided is:

Whether, on and after February 18, 1975, the aforementioned work could have been unilaterally transferred by *SSW* to *SWT*, there to be performed by personnel not covered by the *SSW-BRAC-CBA*.

BRAC's Contentions:

1. "This work* belongs to Clerical Employees under the Scope Rule of the Clerks' Agreement and; — if not by the Scope Rule — by historical custom and practice of being assigned to and performed by clerks in the Store Department for over fifty (50) years.

2. "Work contemplated by the Agreement, Rule 1, must be assigned and performed by employees within the Agreement —".

BRAC cited the following awards of the Third Division as supportive of its contentions.

Awards 323 (Corwin), 360 (Sharfmann), 2418 (Johnson), 3220 (Carter), 7816 (Smith), 8841 (Murphy), 11674 (Rinehart), 13995 (Dolnich) — and Award 211 — Case 426 (Dugan) — this *PLB*.

BRAC cited Awards 8441 (Murphy) and 7816 (Smith) in rebuttal concerning Hellons' status as claimant.

In addition, *BRAC* cited Awards 4869, 4921, 6063 as supporting *BRAC's* position that — "Employees are entitled to payment even though on duty when the violation occurred."

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*Work means - the functions covered by the Material Manager's notice of 2/15/75 — and — as it appears under heading of "Duties" of the "Shop Delivery Truck Operator" - supra.

Also listed are twenty (20) awards said to be supportive of *BRAC's* contention — "that claims may be made in the name of any employee the Brotherhood elects."

Finally, *BRAC* listed Awards 7816, 8414, 10224, 12137 — as supportive of *BRAC's* general argument in this matter.

SSW's Contention:

1. The overall operation of *SSW* — unless restricted by agreement — or limited legally — "is an inherent management prerogative".

Cited in support are Third Division Awards 10924 (Hall), 17923 (Devine) - 19283 (Woody).

2. Rule 1 (Scope) of the parties' "*CBA*" — has been interpreted by the Third Division and this Board — to be general in character; — merely listing positions **without defining work** covered. (*SSW's* emphasis)

3. In this circumstance, "a long line of awards have consistently held that Petitioner must bear the burden of proving that the work in question has been performed by its members traditionally and customarily **over the Carrier's entire system to the exclusion of all others**". (*SSW's* emphasis)

SSW lists the awards as being supportive - 1180 (Christian); 13923 (Dorsey); 14695 (Ives); 16288(Goodman); 17954 (Devine); 19534 (Edgett); 19861 (Blackwell); — and the following awards of this *PLB* — 17, 39, 156, 157 (Dugan), 305 (Gaherin).

4. *BRAC* has failed to meet its burden of proof — *BRAC* has produced no probative evidence necessary to establish that it has the '**exclusive**' right to the work in question.

5. *BRAC's* "—assertions do not attempt to prove or even claim point exclusivity (Pine Bluff) let alone system-wide exclusivity.

6. Transporting wheels falls within the category of transporting Company materials and/or supplies and that; —

7. (a) Under the principles enunciated in many awards relied upon by *SSW* — "its members do not enjoy system-wide exclusive rights to the work in question —."

(b) — throughout the life of the current agreement — and for many years prior thereto over the entire Cotton Belt — shop craft employees, maintenance of way employees, and others including train service and *SWT* employees have transported company material and supplies.

8. Finally — "—transporting wheels — most certainly has not been done by *BRAC* — to the exclusion of all others."

SWT has been used "for many years" — to transport rebuilt mounted freight car wheels from Pine Bluff to Dallas — Texarkana and Shreveport."

"—*SWT* has three special wheel trailers for this type hauling".

"—*SWT* is also used to transport bad order wheel assemblies to Pine Bluff".

Finally — "—Mechanical Department has four special wheel trucks (located at Texarkana, Pine Bluff, Malden and Tyler) —" driven by Carmen.

9. Reduced to essentials — *BRAC* argues the doctrine of "**exclusivity**" should not be followed. That if *BRAC* performed the work in question — even if not exclusively — *BRAC* may not be deprived of it unilaterally.

10. Next; *SSW* argues that *BRAC's* jurisdiction is — "also without **agreement** support. (*SSW* underlining)

That; this contention "—was either directly or inferentially advanced in all of the previously cited scope rule awards involving these parties.

11. With respect to *BRAC's* citation and reliance on Rule 2 (Definition of Clerical Workers) — SSW responds: "Rule 2 is in no way involved —." "—**Not one speck of work specifically defined in Rule 2 is alleged to have been performed by SWT.** (*SSW's* emphasis)

SWT "—**moving** wheels is the claim — and this activity simply does not fit any criteria of Rule 2 —." (*SSW's* emphasis)

12. (a) The form of the claim — and requested remedy —*SSW* calls attention that this is a continuing claim based on the Ellis instructions of February 15, 1975, and those instructions are both the basis of the claim — as well as — the extent of the evidence offered by *BRAC*.

(b) Absent — *SSW* avers — are the specifics — when did *SWT* start performing the disputed work — how much of a driver's day was consumed performing it — the absence of such detail results in a vague, indefinite and uncertain claim.

Awards 16675, 13848 are cited for supporting the dismissal of such vague and uncertain claims.

13. (a) *SSW's* rebuttal to the form of the requested remedy —it is framed so as to produce a prayer only for the difference between straight time and time and one-half.

(b) Further, the maximum penalty would be a "**make whole**" award in favor of Hellons.

Opinion:

These views are the writer's — not necessarily subscribed to by either of the partisan members of this *PLB*.

Borrowing from *SSW's* description* — this neutral views the matter as yet another grievance with potentially serious consequences, which the parties have permitted to fester for some eight (8) years– two (2) months prior to having the issue adjudicated.

The dispute began with the Material Manager's notice of February 15, 1975, advising of his contract with *SWT* to have the disputed work performed pursuant to the terms of that contract.

The net result was to discontinue having a railroad employee — represented by *BRAC*) — perform this work as had been the "—historical custom and practice—" for over fifty (50) years prior to 1975.[a]

Thus, a fair and reasonable judgement of the conflicting contentions of these parties can only be made on the basis of an interpretation of the overall collectively bargained relationship that existed as of February 1975.

This neutral has reviewed all of the awards relied upon by the parties — (some sixty-seven (67) total) — which were furnished to him at the hearing.

Obviously, the most impressive of these awards are those which were available to the parties at about the time of the incident which gave rise to this dispute.

BRAC's submission (p.4) contains the statement —"Carrier owns its own wheel truck and has assigned a clerical employee to operate this wheel truck for as long as it has owned the truck."

At the hearing before this *PLB* discussion developed —in addition to the 'wheel truck' (supra) *SSW* owned three (3) flatbed trailers which were towed from point to point within the Pine Bluff complex collecting and/or distributing wheels.

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*SSW — Submission p.2.

[a] *BRAC* — Submission p.4 --- This claim was also stated without contradiction by General Chairman Pinchard at the hearing 4/19/83.

It was further established that prior to the time the work was contracted out a 'Shop Delivery Truck Operator' drove both the 'tractor' and the 'wheel truck' at times when wheels were being picked up or delivered within the Pine Bluff complex.

The parties' representatives further agreed — (at the hearing before this (*PLB*) that the specific 'wheel-operation" involved in this dispute — (see also *SSW's* submission p.2) —was performed only at the Pine Bluff complex and at no other location on the *SSW* system.

SSW defends against *BRAC's* claim that the 'work' was improperly removed from *BRAC's* jurisdiction and unilaterally contracted to an 'outsider' on the basis - first, it is an " — inherent management prerogative — " to operate the property as it sees fit — subject only to the limitations imposed by contract or law.

Second: *BRAC* has a 'general scope' — which lists covered positions but does not specify the various items of work covered.

Third: That in this circumstance *BRAC* is required to prove that clericals customariiy and historically performed the disputed work system-wide — and that it has failed to do so.

SSW puts considerable weight on the assertion that *BRAC* failed to meet the moving party's burden of establishing proof of '**exclusivity**' and thus cannot prevail.

The writer analyzed each of fifteen (15) awards submitted by *SSW* — including two (2) awards by Dugan 17236 (6/25/69) and 19025 (2/28/72) and has distinguished each from the factual situation of this dispute.

As of February 1975, the performance of the disputed work was localized to a single point on the system, Pine Bluff.

What may have happened thereafter — or currently —is not involved in a disposition of this dispute.

Having determined that the doctrine of '**exclusivity**' did not apply to the 1975 factual setting, we turn to the *BRAC* contention that this work accrued to 'covered employees' pursuant to the terms, interpretations and agreed-upon practices of the *CBA*.

A guide to resolving this question is furnished by the holding in **Award 211 - Dugan** of this *PLB* — adopted June 7,1977 — the Carrier member recorded his 'dissent'.

Award 211 disposed of a grievance based on occurrences on **February 23 and 24, 1973** — two years (2) prior to the filing of this grievance based on Mechanical Department employees having been used to check and unload scrap mounted wheels.

The majority of this *PLB*, after establishing that *SSW* did not dispute Store Room employees' right to handle Company-owned wheels and axles, found that loading and unloading wheels and axles belonged to clerical employees even though the material involved was not *SSW* material.

Significantly — the majority stressed that — the distinction between work on Carrier-owned vs. non-Carrier-owned materials did not authorize *SSW* — "to arbitrarily take work involving non-Carrier-owned materials **from under the scope of the Agreement**".

Finally and in conclusion, the majority found — " — **there is no evidence — that anyone other than the claimants (covered employees) have handled the wheels and axles, whether scrap, carrier-owned or otherwise.** (underlining is by the writer)

Accordingly, based on the facts presented and the evidence adduced, the work upon which this grievance was based accrued to employees covered by the *BRAC - SSW* collectively bargained agreement.

The first two remaining questions:

Was *SSW*, by reason of the limitations imposed by the *CBA*, explicitly or implicitly prohibited from unilaterally subcontracting '**covered work**'?

The applicable *CBA* does not contain a specific prohibition against subcontracting covered work.

However, the parties have clearly recorded their interpretation of the *CBA* in regard to unilateral sub-contracting in Award 211. That holding emphatically does not sanction the unilateral sub-contracting of covered work.

Thus, *SSW* violated the collectively bargained agreement by unilaterally sub-contracting the work involved in this grievance.

The remaining question — What is an appropriate remedy?

BRAC's claim is on behalf of Hellons — his successor(s)-for eight (8) hours per day - 5 days per week at the time and one-half — from February 18, 1975 — until the work complained of is returned —

BRAC cites in support of its claim — Third Division Awards 7816 (Smith; 8841 (Murphy) — and lists Awards 3320, 4869, 4921, 6063 — "and others".

It lists twenty (20) additional awards which it contends provide "claims may be made in the name of any employee the Brotherhood elects."

SSW, in a professionally excellent brief, argues that *BRAC's* request makes no reference to — or offers proof of — when and what loss was incurred — thereby failing to meet its burden of proof —.

SSW cites **Award 16675** — "—The claim is vague and indefinite — claims must be specific — Carrier is under no obligation to develop the claim — the burden is on the Petitioner to present a valid claim" — **Award 13848** is the same thrust.

That; *BRAC's* claims is not an "**in addition to**" prayer —thus; as framed, claim is for the difference between straight time and time and one-half — therefore even if *BRAC's* claim was "**valid**" — claimant would only be entitled to be "**made whole**". Award 13807 is cited in support.

Having concluded that this grievance — for the reasons stated supra — does have contractural merit, this Board must now decide whether granting the claim as stated by *BRAC* would be a reasonable and equitable reparation **under this specific factual setting.**

We respond in the negative. This *PLB* was never given (in this Neutral's opinion) a clear-cut explanation of what Hellons lost —if anything.

Nevertheless, we conclude a penalty is required — therefore, Hellons, his successor(s) shall be paid by *SSW* in addition to all other earnings, eight (8) hours for five (5) days each work week commencing as of February 18, 1975, until such time as the parties stipulate, in writing, that *SSW* has purged itself of the violation of the collectively bargained agreement — i.e., using persons not covered by the *CBA* to perform the work referred to in the Material Manager's notice of February 15, 1975.

All money due and owing Hellons, his successor(s) pursuant to the terms of this award shall be paid to him not later than thirty (30) working days from the adoption of this award.

It Is So Ordered:

R. L. Camp
SSW Member

Charles S. Coleman
BRAC Member

John J. Gaherin
Neutral Appointed
by *NMB*

At Tyler, Texas this 9th day of May, 1983.

MEMORANDUM TO:

Messrs. Charles S. Coleman and R. L. Camp — partisan members — PLB-1186-C (SSW-BRAC)

FROM:

John J. Gaherin - neutral member —and chairman — PLB —1186 (SSW-BRAC)

RE:

Request for Interpretation — Award 316 -- Carriers letter - (5/9/83)

Date:

September 6, 1983

* * * * * * * * * * *

Background:

By letter - (5/9/83) — received 5/13/83 the Carrier Member advised that; —"pursuant to article 10 of the Memorandum of Agreement — 6/21/73 —;"Carrier was requesting an interpretation of Award No. 316.[a]

The Employee Member's letter — 5/18/83 — responding to the Carrier Member's letter — 5/9/83 requesting the interpretation was received — 5/20/83.

The — "Employee Member's Answer" —was also received 5/20/83.

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[a]— "The Carrier member would like to know:
Which express rule or provision of the Collective Bargaining Agreement did the Neutral rely on when concluding . . . a penalty is required . . .?

By letter — (5/25/83) — received 5/27/83 — the Carrier member —"respectfully insists that the "interpretation" be rendered as requested."

* * * * * * * * * * *

By — '**Mailgram**' — 11/20/83 — received 4/21/83 — "All Neutrals performing work under Section 3 — *(RLA)*" were instructed, (in pertinent part), by Executive Secretary Quinn — *NMB* to:

(a) Terminate all compensable service as of 5/31/83.
(b) No more than 15 days were authorized for compensation during May, 1983.

Prior commitments precluded reaching this matter by May 31, —accordingly; I deferred handling it until next authorized by *NMB* to resume Section 3 work.

All Section 3 Neutrals were instructed to resume work effective as of 9/1/83.

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Accordingly, due to the passage of time and, involvement in other matters I was required to again research and study the parties' opposing positions from the beginning — including my notes of our discussion of the matter.

Paragraph (1) Memorandum Agreement — 6/21/73 — limits this Board's jurisdiction to "—disputes growing out of grievances — or out of the interpretation or application of agreements concerning rates of pay — rules — or working conditions."

Paragraph (8) — in pertinent part —provides — "any two members of the Board shall be competent to render an Award".[b]

[b]Charles S. Coleman, (BRAC member) and John J. Gaherin (Neutral), signed the Award — **Concurring** — 5/9/83 —R. L. Camp (SSW member) — signed '**Dissenting**'.

Paragraph (9) — In pertinent part provides — "—Awards — shall be final and binding — subject to the provisions of the Railway Labor Act, as amended by Public Law 89-456.

Paragraph (10) — provides this Board shall remain in existence until all matters submitted to it have been disposed of.

"In case a dispute arises involving an interpretation of an award —the Board upon request of any party — shall make interpretation of the Award in the light of the dispute."[c]

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BRAC's Claim:

1. "—Carrier violated and continues to violate, the Clerks' Agreement in using persons not covered by the Agreement to perform work encompassed in the Agreement, formerly performed by employees within and under the Agreement."

2. "—That Charles Helloms, Jr., his successor or successors, be compensated for eight (8) hours each day, five (5) days per week (Monday through Friday) at the time and one-half rate of Shop Delivery-Truck Operator effective February 18, 1975 and continuing likewise until the work complained of is returned to Employees holding rights thereto and the violation is discontinued."

The Award:

(In pertinent part) —

"—Hellons, his successor(s) shall be paid by *SSW* in addition to all other earnings, eight (8) hours for five (5) days each week commencing as of February 18, 1985, **until such time as the parties stipulate, in writing, that SSW has purged itself of the violation of the collectively bargained agreement** — i.e., using

[c]**Interpretation** — The art or process of discovering and expounding the meaning of a statement — contract (Black's Law Dictionary — Revised 4th Edition)

persons not covered by the *CBA* to perform the work referred to in the Material Manager's notice of February 15, 1975. — " (underlining supplied).

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Interpretation:

BRAC — avers — "an interpretation is not necessary."

SSW — "respectfully insists that the interpretation be rendered."

I concur with BRAC that; — an interpretation would be a redundancy.

The text of the Award Section is free of any ambiguity.

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Further; — the Carrier does seek an "Interpretation.';' — the question posed is —

"Which express rule or provision did the neutral rely on when concluding a penalty is required — ?" (Camp 5/9/83)

The Answer:

Obviously I relied on the whole cloth of the collectively bargained agreement — the agreed upon interpretations thereof — the long standing past practice of the parties.[d]

Regardless of whatever the Carrier's actual motivation is in asking the question; — I will assume the Carrier's interest is in improving the future relationship of the parties.

Thus, I will briefly outline the principles of contract interpretation which I utilized.

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[d]See Award 211 (Dugan) PLB 1186.

1st:

The fact that; — the collectively bargained agreement — then in effect — represented the parties agreed upon determination concerning — the rates of pay — hours of service — and working conditions of the employees of the carrier in the crafts or classes represented by the Union as the certified exclusive bargaining agent of such employees.

2nd:

The fact that; — it is acknowledged by **each party** that the work in question has for at least fifty (50) years been performed **only** at this **one** location.

3rd:

The fact that: — it is acknowledged by **each party** that throughout the period the work was performed by Carrier's employees and that; — those employees were covered by the parties collectively bargained agreement.

4th:

The fact that; — effective on a date in February 1975 — the Carrier **unilaterally** arranged for the work in question to, thereafter, be performed by a contractor utilizing employees **other than Carrier employees covered by the parties collectively bargained agreement.**

5th:

The fact that: — it is well, settled in arbitration law, that custom and practice ultimately ripen into enforceable contractual obligations — i.e., — working conditions which may not be unilaterally changed by either party.

* * * * * * * * * * *

Clearly — in my mind — the instant case is a text book example of a situation governed by the principles enunciated above.

Further, — equally well settled is the principle — that; — the collectively bargained agreement, while stating the parties rights and duties, — is more than just an agreement. It is broad general code designed to cope with a variety of situations never within the contemplation of the draftsmen.

Therefore; — the most reliable — indeed the only reliable road map in determining the parties 'real intent' is to ascertain how they have lived together day to day — i.e. — **their practices.**[e]

The parties' practice in this situation — stretching back over an agreed upon period of fifty (50) years establishes — conclusively — in my judgement — that **the parties** by their practice — **agreed** — to have this work performed by the Carrier's employees and, —specifically by those Carrier employees represented by the Union.

In addition — as I stated in the 'Opinion' — this *PLB* in its **Award 211** clearly interpreted the parties' collectively bargained agreement as prohibiting unilateral subcontracting.

While Arbitrators are not obligated to follow as precedents the decisions of any other Arbitrators or Forum of Adjudication I am constrained to follow Mr. Dugan because we were both dealing with the same parties — and same agreement. Further, I perceive Mr. Dugan's experience to have been greater than mine in dealing with these parties.

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The Matter of Reparations:

Based on the facts presented — the evidence adduced this *PLB* found the Carrier to have willfully violated the parties' collectively bargained agreement as an immediate and direct result of having unilaterally changed the covered employees' working conditions.

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[e]79 LA 618 So. Pac. Transportation -v- BLE --- USW -v- Warrior & Gulf - 80 SCt. - 1347

Clearly it is well settled that; — in these circumstances the covered employees are entitled to be compensated by reason of having been deprived of performing the covered work subject of this dispute.

However, this *PLB* grappling with this situation seven (7) — eight (8) years after the incident — after ruling that the Union's designated claimant of record is to be paid eight (8) hours — five (5) days per work week — remitted to the parties — (**who are uniquely qualified to do so**) the determination of the key fact in establishing '**how much**' the injured employees are to receive.

Said differently this *PLB* **has not** substituted its judgement for that of the parties in determining **when** the Carrier 'purged' itself of the violation.[f]

That determination is in the competent hands of the parties to the violated agreement.

Conclusion:

Hopefully, **Mr. Camp (an able and reasonable man)** — burdened by the insensitivity of various of his predecessors — will recognize that if the Carrier had — "**talked**" — to the Union before depriving covered employees of work they had performed for fifty (50) years — this dispute would not have arisen.

Since we are admonished that it takes two to 'Tango' — hopefully — **Mr. Carpenter** — (an equally competent and reasonable man) having established that the agreement was violated; — will counsel accepting a liberal definition of when — "SSW — purged itself of the violation of the collectively bargained agreement."

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[f]"When an Arbitrator is commissioned to interpret and apply the collectively bargained agreement, he is to bring his informed judgement to bear in order to reach a fair solution to a problem.

This is especially true when it comes to formulating remedies.

The need is for flexibility in meeting a wide variety of situations." Enterprise Wheel 363 US @ 597